IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 205 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KASHIBEN POPATLAL THAKKAR

Versus

RASILABEN WIFE OF HARSHADBHAIJATASHANKER

Appearance:

MR DU SHAH for Petitioner

MR SHIRISH JOSHI for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 22/09/2000

ORAL JUDGEMENT

This Second Appeal is directed against the judgment and decree dated 11th May 1984, passed by the

then learned District Judge at Bhavnagar in Regular Civil Appeal No. 119 of 1992 on his file dismissing the appeal and confirming the judgment and decree passed by then learned Second Joint Civil Judge (JD), Bhavnagar, on 20th August 1982 in Regular Civil Suit No. 502 of 1978 on her file whereby the suit filed by the present respondents came to be allowed and it was declared that the respondents were having an easement right to take light and air through the windows and restraining the appellant from constructing any structure which would obstruct the light and air etc.

2. The respondents No. 1 & 2 are the husband and wife, while respondent No.3 is the tenant. The respondents No. 1 & 2 are having their house near Mamakotha in Lavingiya Chakandavala Street at Bhavnagar. That house is facing West. It is two storied house. The first floor thereof is occupied by respondent No.3 who is the tenant and rest of the floors are occupied by the respondents No. 1 & 2. In the back wall, i.e., the eastern wall of the house on the second floor there are two windows overlooking the property of the appellant. Through those windows the respondents have been getting the light and air for the last over 20 years continuously, uninterruptedly, in the notice of all and as of right. According to the respondents they have thus acquired the right to take light and air through their two windows in the eastern wall. There is no other source of light, except these two windows on the second floor. The appellant wanted to make some construction in his property and therefore she started to construct. She constructed upto the lintel level of the respondents' house. The respondents thought that if further construction was allowed to be made touching to their eastern wall, the two windows through which they were getting the light and air would be completely blocked up and they would lose the easement right to take light and air, as a result use & occupation of 2nd Floor would be impaired. A notice was then sent to the appellant and as no heed was paid to the same, the above suit was then came to be filed in the trial Court for declaratory as well as injunctive relief. The appellant thereafter filed the written statement at Exhibit 14 contending inter alia that no doubt the construction was being made but it was within her limit. The respondents would be sustaining no injury because there was a Navela in between the house of the respondents and the construction she is making. The learned Civil Judge then framed necessary issues at Ex.17. Appreciating the evidence on record, she found that the respondents had established the case they had alleged and therefore the declaratory

as well as the injunctive relief prayed for was required to be granted. A decree was then passed on 20th August 1982. The appellant who failed before the lower Court carried the matter in appeal before the District Court at Bhavnagar. The then learned District Judge heard the appeal and on 11/5/1984 rejected the same confirming the decree passed by the lower Court. It is against that judgment and decree, the present Second Appeal is filed.

3. At the time of admission hearing, several questions of law and facts were sought to be raised but this being the Second Appeal, the questions of fact were not permitted to be raised. The Appeal was then admitted only on the question qua appreciation of evidence and right of the appellant to enjoy her property in the way she liked.

4. In view of the decision rendered by the Supreme Court in the case of Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others - (1999) 3 SCC 722, the Second Appeal can be entertained only if there is a substantial question of law and not a simple question of law. It can never be entertained on the question of facts. What can be considered to be the substantial question of law is also discussed by the Supreme Court. The learned advocate for the appellant therefore submits that the two questions on which the appeal is admitted can be said to be the substantial question of law. Firstly, the he contends that both the lower Courts have not appreciated the evidence rightly as per law. In this regard it may be mentioned that the question regarding appreciation of evidence can be termed the substantial question of law if material and relevant evidence is not considered which if considered would have led to an opposite conclusion or it is shown that the finding arrived at by the courts below was mainly on placing reliance on inadmissible evidence which if so omitted a different conclusion was possible. In either of the situation, a substantial question of law can be said to have been raised. For my such view, a reference to a decision of the Supreme Court rendered in the case of Ishwar Dass Jain (Dead) Through Lrs. Vs. Sohan Lal (Dead) by Lrs. - (2000) 1 S.C.C. 434, may be made. In view of such law, when a query was made, Mr. Shah, the learned advocate representing the appellant, has laboured much going through the record, but he is not in a position to point out any thing which would show that both the lower courts have overlooked the material and relevant evidence on record and gave the findings relying on inadmissible evidence. I have with meticulous care and finicky details examined the evidence on record as well as the judgments rendered by both the courts

below, but I do not find any thing which would justify my interference in the decrees passed. Both the courts below have, taking pains, considered every piece of evidence led, with great care and discussing at length as well as assigning logical reasons, reached the conclusions which any prudent man would like to draw. It is not that both the courts overlooking the relevant and material evidence and relying on the inadmissible evidence, or on the basis of the conjectures and inferences have given the findings in favour of the respondents. The appreciation of the evidence made in this case being quite in consonance with the sound principles of law, and not arbitrary, perverse or wholly in disregard of sound principles of law, the contention does not get a ground to stand upon.

5. Faced with such situation, the learned advocate representing the appellant submits that the appellant has a right to make use of his house in the way she liked and she cannot be restrained from using her house. The contention cannot be accepted. No doubt, the owner of the house has a right to make use of his property in the best possible way he likes, but he has to see that the rights of others are not impaired. The Indian Easement Act puts the restriction on the servient heritage. If a person having the dominant heritage has acquired the right, the servient owner cannot use his property in the way he likes if the way he prefers is injurious to the right of the dominant owner. In the case on hand, the respondents are the dominant owner while the appellant is the servient owner. The respondents have acquired the easement right to take light and air through their windows overlooking the property of the appellant. The appellant is, therefore, a servient owner and she being the servient owner can use the property in the way she likes but certainly not in the manner injurious to the right of the respondents - the dominant owner. In the case on hand, when the respondents have acquired the easement right to take light and air, the appellant cannot be permitted to construct anything in a manner which would block up the windows and would obstruct the right to take the light and air acquired by the respondents. When such restriction is imposed by the law, it is not open to the appellant to submit that she can construct any thing she likes under the guise that she being the owner is having a right to enjoy the property in the way she likes. On this count, the decree passed cannot be disturbed. The contention must therefore fail.

6. Mr. Shah at this juncture raises a new plea

submitting that the appellant may be permitted to construct because the construction in question is not falling with the ambit of the rule of 45 degrees. Such plea was not at all taken in both the courts below. On the contrary, it is found that touching the eastern wall of the respondents, the construction is being made. Here, a new plea is sought to be raised. When before the lower courts below no such plea requiring factual investigation was raised, and no issue in that regard was also sought at the stage of Second Appeal, such a new ground cannot be permitted to be raised. Further, this would not be the substantial question of law, but would mainly be the question of fact and on that count also the new plea cannot be permitted to be raised. On no other count, the submissions are advanced.

7. For the aforesaid reasons, the appeal fails and is hereby dismissed with no order as to costs.

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